LOK KOK BENG & ORS v. LOH CHIAK EONG & ANOR

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RICHARD MALANJUM CJ (SABAH & SARAWAK)
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
[CIVIL APPEAL NO: 02(f)-4-02-2013(P)]
2 JULY 2015

TORT: *Negligence – Economic loss – Building contract – Dispute relating to delay in completion of industrial buildings purchased by appellants – Appellants claimed against respondents as project architects for consequential financial loss – Whether matters contributed to delay fell within professional work of respondents – Whether respondents owed duty of care to appellants apart from their duty in contract or tort to developer – Whether respondents able to foresee consequential financial loss suffered – Whether Federal Court should be final determiner of judicial policy on extensions of liability of architects to cover pure economic loss – Whether it was fair, just and reasonable to impose duty of care on respondents*

CONTRACT: *Building contract – Delay – Claim against third party for economic loss – Appellants claimed against respondents as project architects for consequential financial loss – Whether matters contributed to delay fell within professional work of respondents – Whether respondents owed duty of care to appellants apart from their duty in contract or tort to developer – Whether respondents able to foresee consequential financial loss suffered – Whether Federal Court should be final determiner of judicial policy on extensions of liability of architects to cover pure economic loss – Whether it was fair, just and reasonable to impose duty of care on respondents*

This appeal stemmed from a dispute relating to an industrial building project ('the project') in Seberang Perai Tengah, Pulau Pinang. The appellants were the purchasers of units of industrial buildings in the project and had signed their respective sale and purchase agreements ('the SPAs') with the developer. The respondents were the project architect appointed by the developer. The original layout plan was approved by the Local Authority, who in granting approval for the project, imposed a condition that the requirements of the Department of Environment ('DOE') must be complied with. Following an application by the developer, the DOE *vide* its approval letter made it mandatory that a Central Effluent Industrial Treatment System ('CEITS') be designed by a specialist licensed by the DOE and built according to certain specifications. It was the appellants' case that vacant possession of the industrial building was to be delivered within 24 months from the date of the approval of the building plan, however there was a delay of eight years in the completion of the industrial building due to the amendment of the original layout plan and delay in obtaining the certificates

of fitness for occupation ('CFO'). Accordingly, the appellants' claims against the respondents were pecuniary in nature and fell under the heading of pure economic loss. The trial judge found the respondents liable for the delay in the completion of the project and apportioned liability at 50% against them. On appeal, the Court of Appeal reversed the findings of the High Court, and the appellants' claims were dismissed largely on grounds of policy. In this appeal, the issues to be determined were, *inter alia*, (i) whether the construction of the CEITS including other matters arising thereof and the preparation of the original layout plan including the amendments made to the original layout plan fell within the professional work of the respondents; (ii) whether the respondents owed a duty of care to the appellants apart from their duty in contract or tort to the developer; (iii) whether the respondents were able to foresee that the various acts or omissions complained of would have led to an undue delay in the approval of the CFO causing the appellants to suffer consequential financial loss; (iv) whether the Federal Court as the apex court should not be the final determiner of judicial policy on extensions of liability of architects to cover pure economic loss; and (v) whether it was fair, just and reasonable to impose on the respondents a duty of care for a responsibility which they had not assumed or one which was not within their professional scope of duty.

Held (dismissing appeal with costs)
Per Zainun Ali FCJ delivering the judgment of the court:

(1) It cannot be disputed that the construction of the CEITS was not the responsibility of the respondents. Clause 14.02 and the Sixth Schedule of the SPAs specifically imposed on the developer a duty to build the CEITS according to specifications required by the DOE and the relevant statutory provisions. That being the case, the CEITS was designed by a specialist license by the DOE and subsequently constructed by the developer. Therefore, the respondents need not assume responsibility for the delay involved in obtaining the approval for CFO when the CEITS was not functioning in accordance with the requirements set out by the DOE, since this was not within the scope of the respondents' professional work. (para 33)

(2) The requirement of reasonable foreseeability had not been satisfied. As the architect for the project, the layout plan was prepared and submitted in accordance with the instructions received by the respondents from the developer. The respondents were mainly responsible for the design and safety of the industrial buildings and compliance of the relevant laws. In the circumstances, it would not be reasonable to impose a duty on the respondents to go into a detailed inquiry of the developer's obligations as those were matters which were exclusively within the developer's scope of duty. This argument was further strengthened by s. 2.01 of the SPAs which provided that reasonable amendments to the building plan may from time to time be made by the developer or the respondents with

the approval of the appropriate authorities. Here, the issue of consent of the neighbouring landowners which triggered the delay was well within the scope of the developer's duty. (para 40)

(3) Applying the standards of the reasonable man, the respondents could not have foreseen any liability for consequential financial loss to the appellants arising from their action in submitting the original layout plan and amending the same leading to the undue delay in completing the building and the issuance of the CFO. In addition, the appellants' claims did not fall within the scope of work of the respondents. The appellants also failed to establish proximity of relationship between the parties to give rise to a duty of care. In view of the terms of the SPAs between the appellants and the developer and the specific remedy provided therein, the appellants' claims failed. (paras 41 & 42)

(4) The court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly defined the rights and liabilities of the parties and their relative bargaining positions. There could be no action against the architect if the remedy asked for was specifically provided for in the contract. Otherwise, it had the effect of rewriting the contractual terms. Such claims must be dismissed on grounds of policy. Nevertheless, it must be reiterated that a claim for negligence must be brought within the scope of duty of care. Therefore, the recoverability of claims for pure economic loss in negligence cases was dependent on the facts of individual cases and some measure of public policy must be considered though it should not be the sole determinant of liability. (paras 81 & 82)

(5) It would not be fair, just and reasonable to impose on the respondents a duty of care for a responsibility which they had not assumed or one which was not within their professional scope of duty. In this instance, the appellants' claims did not fall within the scope of work of the respondents' and therefore, the appellants' claims for pure economic loss on grounds of late delivery of vacant possession of their building units failed. (para 85)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini berbangkit daripada pertikaian berkaitan projek pembangunan industri ('projek') di Seberang Perai Tengah, Pulau Pinang. Perayu-perayu merupakan pembeli unit-unit bangunan industri dalam projek tersebut dan telah menandatangani perjanjian jual beli ('PJB') masing-masing dengan pemaju. Responden-responden merupakan arkitek projek yang dilantik oleh pemaju. Pelan susun atur asal telah diluluskan oleh Pihak Berkuasa Tempatan semasa memberi kelulusan projek tersebut telah mengenakan syarat di mana syarat-syarat yang dikenakan oleh Jabatan Alam Sekitar ('JAS') harus dipatuhi. Berikutan permohonan oleh pemaju, JAS melalui

surat kelulusannya mewajibkan Sistem Rawatan Effluen Perindustrian Pusat ('CEITS') direka oleh pakar yang berlesen dengan JSA dan dibina mengikut spesifikasi tertentu. Adalah kes perayu bahawa milikan kosong pembangunan industri akan diberikan dalam tempoh 24 bulan dari tarikh kelulusan pelan pembangunan, tetapi terdapat penangguhan selama lapan tahun dalam menyiapkan pembangunan industri tersebut disebabkan oleh pindaan pelan susur atur asal dan kelewatan dalam mendapatkan sijil kelayakan menduduki ('CFO'). Oleh itu, tuntutan perayu-perayu terhadap responden-responden yang bersifat kewangan dan terangkum di bawah tajuk 'prinsip kerugian kewangan'. Hakim bicara mendapati bahawa responden-responden bertanggungjawab ke atas kelewatan dalam menyiapkan projek tersebut dan mengagih liabiliti pada 50% terhadap mereka. Atas rayuan, Mahkamah Rayuan mengakas dapatan Mahkamah Tinggi dan tuntutan perayu-perayu sebahagian besarnya ditolak atas dasar polisi. Dalam rayuan ini, isu-isu yang perlu dipertimbangkan adalah, antara lain, (i) sama ada pembinaan CEITS termasuk perkara-perkara lain yang timbul ekoran daripada itu dan penyediaan pelan susun atur asal termasuk pindaan yang dibuat kepada pelan susur atur asal terangkum dalam kerja profesional responden-responden; (ii) sama ada responden-responden mempunyai kewajipan berjaga-jaga terhadap perayu-perayu selain daripada kewajipan mereka dalam kontrak atau tort kepada pemaju; (iii) sama ada responden-responden dapat menjangkakan bahawa pelbagai perbuatan atau pengecualian yang diadukan itu akan membawa kepada kelewatan yang tidak wajar dalam kelulusan CFO menyebabkan perayu-perayu menanggung kerugian kewangan; (iv) sama ada Mahkamah Persekutuan sebagai mahkamah tertinggi tidak sepatutnya menjadi penentu akhir dasar kehakiman dalam memperluaskan liabiliti arkitek untuk merangkumi prinsip kewangan kerugian; dan (v) sama ada adil, saksama dan munasabah untuk mengenakan ke atas responden-responden suatu kewajipan berjaga-jaga untuk tanggungjawab yang mereka tidak pikul atau sesuatu yang bukan dalam skop tugas profesional mereka.

Diputuskan (menolak rayuan dengan kos)

Oleh Zainun Ali HMP menyampaikan penghakiman mahkamah:

(1) Tidak boleh dipertikaikan bahawa pembinaan CEITS adalah bukan tanggungjawab responden-responden. Fasal 14.02 dan Jadual Keenam PJB khususnya mengenakan ke atas pemaju suatu tugas untuk membina CEITS mengikut spesifikasi yang dikehendaki oleh JAS dan peruntukan statutori yang relevan. Oleh itu, CEITS telah direka oleh pakar berlesen oleh JAS dan kemudiannya dibina oleh pemaju. Lantarannya, responden-responden tidak perlu memikul tanggungjawab bagi kelewatan yang terlibat dalam mendapatkan kelulusan CFO apabila CEITS tidak berfungsi mengikut keperluan yang telah ditetapkan oleh JAS kerana ini bukan dalam skop tugas profesional responden-responden.

(2) Keperluan untuk jangkaan munasabah tidak dipenuhi. Sebagai arkitek bagi projek tersebut, pelan susur atur telah disediakan dan dikemukakan sejajar dengan arahan yang diterima oleh responden-responden daripada pemaju. Responden-responden sebahagian besarnya bertanggungjawab bagi reka bentuk dan keselamatan bangunan-bangunan industri dan pematuhan kepada undang-undang yang relevan. Dalam keadaan ini, tidak munasabah untuk mengenakan tugas kepada responden-responden untuk membuat siasatan terperinci terhadap obligasi pemaju kerana perkara tersebut adalah secara ekslusif termaktub dalam skop tugas pemaju. Hujah ini diperteguhkan lagi oleh s. 2.01 PJB yang memperuntukkan bahawa pindaan yang munasabah kepada pelan bangunan boleh dari semasa ke semasa dibuat oleh pemaju atau responden-responden dengan kelulusan pihak berkuasa yang berkenaan. Di sini, isu persetujuan bagi tanah yang bersempadan yang mencetuskan kelewatan adalah dalam skop tugas pemaju.

(3) Menggunakan standard orang yang munasabah, responden-responden tidak dapat menjangkakan apa-apa liabiliti bagi kerugian kewangan kepada perayu-perayu yang berbangkit daripada tindakan mereka dalam mengemukakan pelan susur atur asal dan meminda yang sama yang membawa kepada kelewatan tidak wajar dalam menyiapkan bangunan dan pengeluaran CFO. Di samping itu, tuntutan perayu-perayu tidak termasuk dalam skop kerja responden-responden. Perayu-perayu juga gagal membuktikan kedekatan hubungan antara pihak-pihak bagi membangkitkan kewajipan berjaga-jaga. Memandangkan syarat-syarat PJB adalah antara perayu-perayu dan pemaju dan remedi spesifik yang diperuntukkan di dalamnya, tuntutan perayu-perayu gagal.

(4) Mahkamah harus memberi pertimbangan kepada kewujudan kontrak matriks antara pemaju dan pembeli-pembeli yang mentakrifkan dengan jelas hak-hak dan liabiliti-liabiliti pihak-pihak dan kedudukan masing-masing. Tiada tindakan terhadap arkitek jika remedi yang dipohon telah diperuntukkan dalam kontrak. Sebaliknya, ia memberi kesan menulis semula terma kontrak. Tuntutan sedemikian mesti ditolak atas dasar polisi. Walau bagaimanapun, ia mesti diulangi bahawa tuntutan kecuaian mesti dibawa dalam skop kewajipan berjaga-jaga. Lantarannya, kebolehpulihan tuntutan untuk prinsip kerugian kewangan dalam kes-kes kecuaian bergantung kepada fakta kes-kes individu dan beberapa langkah polisi awam perlu dipertimbangkan walaupun ia tidak seharusnya menjadi penentu tunggal liabiliti.

(5) Adalah tidak adil, saksama dan munasabah untuk mengenakan ke atas responden-responden suatu kewajipan berjaga-jaga untuk tanggungjawab yang tidak dipikul oleh mereka atau satu yang bukan dalam skop tugas profesional mereka. Dalam hal ini, tuntutan perayu-perayu tidak termasuk dalam skop kerja responden-responden dan oleh itu, tuntutan perayu-perayu untuk prinsip kerugian kewangan atas alasan penyerahan lewat milikan kosong unit-unit bangunan mereka gagal.

Case(s) referred to:

Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***

Baxall Securities Ltd v. Sheard Walshaw Partnership [2002] EWCA Civ 09 ***(refd)***

Bellefield Computer Services v. E Turner & Sons Ltd [2002] EWCA Civ 1823 ***(refd)***

Bryan v. Maloney [1995] 128 ALR 163 ***(refd)***

Caparo Industries Plc v. Dickman And Others [1990] 1 All ER 568; [1990] 2 AC 605 ***(refd)***

Customs & Excise Commissioners v. Barclays Bank plc [2007] 1 AC 181 ***(refd)***

D & F Estates Ltd And Others Appellants and Church Commissioners For England And Others Respondents [1989] AC 177 ***(refd)***

Donoghue v. Stevenson [1932] AC 562 ***(refd)***

Go Dante Yap v. Bank Austria Creditanstalt AG [2011] SGCA 39 ***(refd)***

Hedley Byrne v. Heller [1964] AC 465 ***(refd)***

Henderson v. Merrett Syndicates Ltd [1995] 2 AC 145 ***(refd)***

Henderson v. Merrett Syndicates Ltd, Hallam-Eames v. Merrett Syndicates Ltd, Hughes v. Merrett Syndicates Ltd, Arbuthnott v. Feltrim Underwriting Agencies Ltd, Deeny v. Gooda Walker Ltd (in liq) [1995] 2 AC 145 ***(refd)***

Lembaga Kemajuan Tanah Persekutuan v. Mariam & Ors [1984] 1 LNS 168 FC ***(refd)***

Lim Kar Bee v. Abdul Latif Ismail [1977] 1 LNS 64 FC ***(refd)***

Lim Teck Kong v. Dr Abdul Hamid Abdul Rashid & Anor [2006] 1 CLJ 391 CA ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Man B&W Diesel S E Asia Pte And Another v. PT Bumi International Tankers And Another Appeal [2004] 2 SLR 300 ***(refd)***

Murphy v. Brentwood District Council [1991] 1 AC 398 ***(refd)***

Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd (The Wagon Mound) [1961] AC 388 ***(refd)***

Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor [1999] 8 CLJ 403 HC ***(refd)***

RSP Architects Planners & Engineers v. Ocean Front Pte Ltd And Another Appeal [1996] 1 SLR 113 ***(refd)***

RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v. Management Corporation Strata Title Plan No 1075 And Another [1999] 2 SLR (R) 134 ***(refd)***

Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency [2007] 4 SLR 100 ***(refd)***

Sutherland Shire Council v. Heyman (1985) 60 ALR 1 ***(refd)***

Tan Juay Pah v. Kimly Construction Pte Ltd and Others [2012] SGCA 17 ***(refd)***

UDA Holdings Bhd v. Koperasi Pasaraya (M) Bhd & Other Appeals [2009] 1 CLJ 329 FC ***(refd)***

Ultramares Corp v. Touche [1931] 255 NY 170 ***(refd)***

Voli v. Inglewood Shire Council [1963] ALR 657 ***(refd)***

Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] 1 AC 175 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3

For the appellants - Cyrus V Das (Siau Suen Miin, Loo Yook Khin & Gregory V Das with him); M/s Siau Suen Miin & Tan

For the first respondent - Chan Kean Li (Edwin Seibel, Lim Poh Leong, Yap Kok Kheong & Ong Bee Khoon with him); M/s Gibb & Co

[Editor's note: For the Court of Appeal judgment, please see Loh Chiak Eong & Anor v. Lok Kok Beng & Ors [2012] 9 CLJ 699.]

Reported by S Thara

JUDGMENT

Zainun Ali FCJ:

[1] This is an unanimous decision.

The Issues

[2] The appeal before us stemmed from a dispute relating to an industrial building project known as "Projek Skim Bangunan Industri Ringan Bersepadu Pencemaran Bebas" in Seberang Perai Tengah, Pulau Pinang. As its name suggests the project was a special industrial project intended to cater for industries that were likely to produce and discharge environmentally hazardous substances and which may pose environmental risks to living organisms as defined in the Environmental Quality Act 1974 (EQA).

[3] This appeal focuses on the practical problems in the law of negligence with regard to the general and consequential issues relating to the duty of care owed by the respondents to the appellants against damages being pure economic loss, not linked to any personal injury or structural defects or damage to the property.

Background Facts

[4] There were 50 appellants in this appeal. They were the purchasers of units of industrial buildings in the above named project. The developer of the project was Merger Acceptance Sdn Bhd. In 1995, the appellants signed their respective sale and purchase agreements (the SPAs) with the developer. The respondents were the project architects appointed by the developer. Rakyat Corporation Sdn Bhd (the first defendant at the High Court) was the project manager.

[5] Since the project was a special industrial project as stated above compliance with the mandatory requirements of the relevant statutory provisions was crucial.

[6] The salient terms of the SPAs are as follows:

(i) Clause 7.01 prescribes that the industrial building was to be completed by the developer and vacant possession be delivered to the appellants within 24 months from the date of the approval of the building plan. Failing which, the appellants were entitled for payment of liquidated damages at the rate of ten percentum (10%) per annum of the purchase price.

(ii) By s. 2.01, "building plan" refers to the plan submitted by the developer to the appropriate authorities for the construction of the industrial building and includes such reasonable amendments to the building plan as may from time to time be made by the developer or the respondent architect and approved by the appropriate authorities or such amendments as may be required by the appropriate authorities.

(iii) Clause 7.03 imposes on the developer a duty to procure the issuance of certificate of fitness for occupation (CFO) and to comply with all the requirements of the appropriate authorities in respect of the construction of the industrial building.

(iv) Clause 14.02 and the Sixth Schedule of the SPAs specifically imposed on the developer a duty to comply with the mandatory requirements of the relevant statutory laws. Amongst others, the developer was required to build a toxic waste water treatment plant known as Central Effluent Industrial Treatment System (CEITS) for treatment of hazardous and toxic waste according to specifications required by the Department of Environment (DOE) and the statutory provisions of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979.

[7] On 20 December 1994, the original layout plan was approved by the local authority, Majlis Perbandaran Seberang Prai (MPSP). In granting approval for the project, MPSP imposed a condition that the requirements of the DOE in particular the provisions of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979 must be complied with.

[8] Following an application by the developer, the DOE *vide* its approval letter dated 12 August 1997 made it mandatory that a CEITS be designed by a specialist licensed by the DOE and built according to certain specifications. In addition, the CEITS must first be functioning and operational to the satisfaction of the DOE before the CFO for the project can be issued. Accordingly, the developer engaged a specialist consultant as specified and built a CEITS for the project.

[9] It is the appellants' case that vacant possession of the industrial building was to be delivered within 24 months from the date of the approval of the building plan. But there was a delay of eight years in the completion of the industrial building due to the following:

(i) Amendment of the original layout plan.

The original layout plan was approved by MPSP on 20 December 1994. The original layout plan was submitted to MPSP on the assumption that all the neighbouring landowners had consented to some slope cutting on their respective property. However, due to the refusal of one of the neighbouring landowners to give his consent, the respondents were then required to amend the original layout plan to reflect the true road and drainage works that had been carried out. The amended layout plan was then approved by MPSP on 5 August 1999.

(ii) Delay in obtaining the certificates of fitness for occupation (CFO)

The DOE refused to grant certification of approval for the CEITS since it did not function according to the requirement of the DOE. In the absence of this certification of approval, the respondents thus refused to comply with the developer's instruction to apply for the CFO. The respondents had taken the stand that the approval for the project from MPSP was conditional upon compliance with the requirements imposed by the DOE and the statutory provisions of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979.

[10] Consequently on 13 June 2005, the respondents resigned as the architects of the project.

[11] The CFO for the industrial building was subsequently issued on 4 July 2005.

[12] On 27 February 2003, the appellants filed an action for negligence against the project manager (first defendant at the High Court) and the respondents for financial loss suffered, due to late delivery of vacant possession of their industrial units. It is the appellants' case against the respondents that as the project architects, the latter had acted negligently in the preparation of the original layout plan resulting in its amendment, in the supervision of the works and in the certification of completed works, thereby causing a delay of eight years for the completion of the industrial buildings.

The Appellants' Claims

[13] The appellants' claims are pecuniary in nature and fall under the heading of pure economic loss. They could be summarised as follows:

(i) Appellants nos. 19, 37, 38, 40, 41 and 47 whose units were not completed, claimed for the loss of progress payments made and interests.

(ii) Appellants nos. 1, 6, 7, 8, 12, 13, 25, 34, 37, 38, 43, 44, 45 and 46, who suffered loss of use and who had to bear the costs of an alternative building.

(iii) Appellants nos. 1, 3 to 5, 9 to 11, 14 to 20, 24, 26, 31 to 33, 35, 36, 39, 42, 48 to 50 who suffered loss of rental profits or incomes.

[14] The developer was wound up in 2002. This was followed by winding up of Rakyat Corporation Sdn Bhd (as project manager) in November 2009.

Decision Of The High Court

[15] After a trial of the action, the High Court Judge found the respondents liable for the delay in the completion of the project and apportioned liability at 50% against them. The court found that:

(i) The respondents had negligently prepared the original layout plan on an assumption of fact that proved to be false. The respondents had acceded to the developer's instruction to submit the original layout plan for approval notwithstanding that one of the owners of the neighbouring lands refused to give consent.

(ii) There was negligent supervision and certification of the works on the part of the respondents:

> However, the Architect certificate (Exh. P3) certified the completion of earthwork on 01.03.1996 and the completion of RC foundations of the building on 06.05.1996 and 7.11.1996 respectively prior to the obtaining of approval from Jabatan Alam Sekitar on 12.08.1997.
>
> The building works started even earlier notwithstanding that Loh & Loh Architect had not received the approval and the attached condition of Jabatan Alam Sekitar dated 12.8.1997 (exh. D1)

(iii) The respondents had certified the completion of works to proceed and certified the completion of works until the "road and drainage" stage even before the inclusion of CEITS in the approved layout plan.

(iv) The amendments made to the original layout plans and rectification works were due to the negligence of the respondents.

[16] The trial judge then concluded that the respondents owed a duty of care to the appellants for proper inspection and/or supervision or omission of the work at the site and that there was breach of such duty which contributed to the delay in the issuance of the CFO. The trial judge held that:

> The 2nd and 3rd defendants ought to know that when the approved plan of the authority was not complied with, amendments to this plan had to be made and that would undoubtedly delay the completion of the work in time for the CF to be issued and the delivery of vacant possession to be handed to the purchasers because approval for the amended plan would take a long time.
>
> Had the 2nd and 3rd defendants exercised their duty of care with diligence and competence, they would have detected or avoided or stopped the non compliance of the contractors or engineers in the construction of the road and drainage that was not according to the original approved layout plan.
>
> From the evidence in this case, I find that the delay which resulted in the delivery of vacant possession of 8 years was attributed by the improper inspection and/or supervision or omission of the work at the site, to be a breach of the duty of care owed to the plaintiffs to have their unit of the industrial building purchased by them completed in time to hand over vacant possession with CF for their use.

Decision Of The Court Of Appeal

[17] On appeal, the Court of Appeal reversed the decision of the trial judge. It must be noted that the appellants' claim was dismissed largely on grounds of policy. The judgment of the court was centred on the tripartite relationship between the developer, the appellants and the respondents and the existence of contractual remedy in that:

(i) The respondents were merely the agents of the developer. Therefore the developer must be made answerable to the negligent conduct of the respondents, if any.

(ii) In any case, the subject matter of the appellants' claim with regard to the obtaining of the CFOs is governed by cl. 7.03 of the SPAs, entered between the appellants and the developer. On that basis, it would be unjust to impose on the respondents a duty of care in respect of the same to the appellants. In its decision, the Court of Appeal found persuasive authority in the Singapore Court's decision in *Man B&W Diesel S E Asia Pte And Another v. PT Bumi International Tankers And Another Appeal* [2004] 2 SLR 300.

[18] It was also highlighted that in the present case, the appellants' claims for damages were purely financial in nature. Such damages were not recoverable since they were not linked to any personal injury or structural defects or damage to the property.

[19] On the findings of facts, the court found that the trial judge erred in his finding when he concluded that the respondents were negligent in exercising their supervisory duties. The Court of Appeal viewed that the evidence before the court showed that the delay in obtaining the CFO was not attributed to the respondents' negligence. It held that:

(i) It was not the fault of the respondents that the original layout plan had to be amended. The trial judge failed to consider the evidence of Mr Ooi Yeow Khoon (PW2), the civil and structural engineer of the project and Mr Chew Kam Soon (DW3 - a former director of the developer). These witnesses testified that the original layout plan was prepared by the respondents on the advice of an expert, namely the project engineer. The latter had relied on the assurance given by the developer that they would be able to obtain the consent of all owners of the neighbouring lots but they failed to do so;

(ii) There was undisputed evidence that the CEITS was built by the developer on the advice of the specialist consultant. Therefore, the fact that the CEITS was not functioning in accordance with the satisfaction of the DOE cannot be within the respondents' scope of work;

(iii) The respondents' refusal to proceed with the application for CFO was justified. In this regard, the trial judge failed to consider the evidence of Mr Muniandy (DW1), the Chief Assistant Director of the Department of Environment that the DOE would not support any application for CFO if it did not comply with the mandatory requirement stated in the Environmental Quality Act 1974.

Appeal To The Federal Court

[20] The appellants were granted leave to appeal to the Federal Court on the following questions of law:

(i) Whether the architects (respondents) in a construction project owed a duty of care to purchasers apart from his duty in contract or tort to the developer?

(ii) Whether the architects' liability in tort to purchasers should arise on the basis that they fall within the range of persons who are reasonably foreseeable as likely to be injured by his lack of skill or diligence?

(iii) Whether the purchasers' only remedy in law is to sue the developer?

(iv) Whether the Federal Court as the apex court should not be the final determiner of judicial policy on extensions of liability of architects to cover pure economic loss?

(v) Whether a project architect could avoid liability for negligence by saying that he relied on the designs and plans of another professional or by delegating the task?

Appellants' Submission

[21] The appellants' main thrust was that the respondents were negligent in preparing the original layout plan. The respondents' response was that the said layout plan had to be amended due to the non-consent of one of the neighbouring landowners. Thus rectification works had to be done. The certification of the completed works was affected, which caused and contributed to the eight years delay in the completion of the project.

[22] The appellants went on to submit that a contractual relationship does not preclude a liability in tort. An architect owes a contractual duty and a parallel duty in tort. (*Bellefield Computer Services v. E Turner & Sons Ltd* [2002] EWCA Civ 1823, *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145).

[23] That there was a breach of duty of care on the part of the respondents. The appellants indicated that they have satisfied the tests of foreseeability and proximity in that the respondents were in a position to foresee that their acts and omissions complained of would result in a delay in obtaining the CFO and consequential financial loss to the appellants who were the "known recipients".

[24] In Malaysia, although a claim for pure economic loss is not recoverable against a local authority on grounds of public policy (*Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389), the law does not extend to private bodies or professionals rendering services for commercial consideration.

Respondents' Submission

[25] The respondents averred that the CEITS for the project was designed by a specialist licensed by the DOE and was constructed by the developer. It was not within the scope of the respondents as the architects for the project to determine the site location, design and specifications of the CEITS.

[26] The refusal of the respondents to apply for CFO was due to the non-compliance of the mandatory DOE requirement.

[27] The appellants' claims are for pure economic loss suffered due to the delay and/or non-application of CFO of the industrial building. The existence of a duty of care must depend on the facts and circumstances of each case. The court must also exercise caution in extending a duty of care to new circumstances (case referred: *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389). It would not be fair, just and reasonable to impose on the respondents (as project architects) a duty of care for a responsibility which they had not assumed or one which is not within their professional scope of duty. It would also be against public policy to impose on all architects the duty to deliver vacant possession of buildings within the developer's contractual period. The above contention is strengthened by the fact that the remedy afforded to the appellants for late delivery claims are contractually provided for under s. 7.01(b) of the SPAs.

Decision

Architect May Be Liable For Negligence Against A Third Party

[28] The present case is a building construction dispute where the rights of the appellants were largely governed by the contracts entered into with the developer. The party being sued were the respondents. In the absence of any contract between the appellants and the respondents, the appellants brought their action in tort relying on breach of duty of care.

[29] Tortious liability arises from a wrongful act where the common law imposes a duty to take reasonable care. It is settled law that despite the existence of a contractual relationship between parties in an action, liability in negligence extends beyond the contractual obligations (*Lembaga Kemajuan Tanah Persekutuan v. Mariam & Ors* [1984] 1 LNS 168; [1984] 1 MLJ 283).

[30] In the absence of any contract, an architect rendering his professional service in a construction project can be made liable for negligence if the damage and injury suffered by the purchasers was caused by his act or

omission within the scope of duty of care of the architect. In *Voli v. Inglewood Shire Council* [1963] ALR 657, an architect was made liable for injury caused to the plaintiff as a result of the collapse of the stage designed by the architect. It was held by the High Court of Australia that an architect may, in appropriate circumstances owe a duty of care in tort as regards the sufficiency of his design and supervisory work. Such a duty can be owed to third parties with whom he has no contract.

[31] At p. 661, Windeyer J held that:

> An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.
>
> Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v. Stevenson* (1932) AC 562, it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment.

See also the decisions of the House of Lords in *Henderson v. Merrett Syndicates Ltd*, *Hallam-Eames v. Merrett Syndicates Ltd*, *Hughes v. Merrett Syndicates Ltd*, A*rbuthnott v. Feltrim Underwriting Agencies Ltd, Deeny v. Gooda Walker Ltd (in liq)* [1995] 2 AC 145, *Baxall Securities Ltd v. Sheard Walshaw Partnership* [2002] EWCA Civ 09.

[32] Applying the above principles, in the present case, a preliminary question that needs to be answered is whether the construction of the CEITS including other matters arising thereof and the preparation of the original layout plan including the amendments made to the original layout plan fall within the professional work of the respondents?

[33] It cannot be disputed that the construction of the CEITS was not the responsibility of the respondents. Clause 14.02 and the Sixth Schedule of the SPAs specifically imposed on the developer a duty to build the CEITS for treatment of hazardous and toxic waste according to specifications required by the DOE and the statutory provisions of the Environment Quality Act (Industrial Effluent and Discharge) Regulations 1978. That being the case, the CEITS was designed by a specialist licensed by the DOE and subsequently constructed by the developer. We are of the view that the respondents need not assume responsibility for the delay involved in obtaining the approval for CFO when the CEITS was not functioning in

accordance with the requirements set out by the DOE, since this was not within the scope of the respondents' professional work. It must also be mentioned that the respondents' refusal to submit the application for CFO was merely in the discharge of their duty of care to the appellants in view of the project which was a special industrial project and ensuring that the CEITS functions in accordance with the standard required by the DOE.

[34] On the other hand, the preparation of the original layout plan and its subsequent amendments were made in the course of the respondents' professional work. These had resulted in undue delay in the completion of the industrial buildings. The question is whether the respondents had acted negligently in merely carrying out the developer's instructions. It was the developer who had authority to make decisions. This question must be answered within the purview of the scope of duty of care in the law of negligence.

The Scope Of Duty Of Care

[35] In *Lim Kar Bee v. Abdul Latif Ismail* [1977] 1 LNS 64; [1978] 1 MLJ 109, Raja Azlan Shah FCJ (as His Highness then was) referred to the common law principles of foreseeability and proximity as the principles giving rise to a duty of care. At p. 117 of the judgment His Lordship said that:

> The claim in negligence postulates a breach by the defendant of some duty owed by him to the plaintiff. Accordingly the first question to be asked and answered is whether a duty was owed to the plaintiff by him of which he committed a breach. In order to determine the existence of this duty, I think a citation of two passages from well-known judgments are relevant. The first is from the judgment of Brett M.R. in *Heaven v. Pender* (1883) 2 QBD 503: "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The second is from the famous dictum of Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562, 580: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." ...

Foreseeability

[36] The threshold test in determining the existence of duty of care is that of foreseeability. The rule in the case of *Heaven v. Pender* as quoted above envisaged that a man ought to have foreseen certain consequences if he created a real risk of them. The test is whether damage to someone in the

plaintiff's position was a reasonably foreseeable consequence of the defendant's negligence. Reasonable foreseeability does not of itself lead to a duty of care and that the speech of Lord Atkin of "persons who are so closely and directly affected by my act" stressed not only on the requirement of foreseeability of harm but also that of a close and direct relationship of proximity.

[37] By foreseeability, liability for a consequence is imposed and judged by the standard of the reasonable man that he ought to have foreseen it. In the words of the Privy Council in *Overseas Tankship (UK) Ltd Appellants; And Morts Dock & Engineering Co Ltd (The Wagon Mound)* - [1961] AC 388, 423:

> For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.

[38] Closer to home, the Singapore Court of Appeal in *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4 SLR 100 observed that the requirements of foreseeability is merely a "threshold question" that needs to be answered in every negligence claim, having regard to the facts of the case without resorting to any legal formulation. By the term "factual foreseeability" *Spandeck* takes the view that it is from a factual perspective, that the defendant ought to have known that the claimant would suffer damage from his carelessness. Being merely factual, it is not concerned with the kind and extent of losses suffered by the plaintiff and that it must not be confused with the question of remoteness of damages in tort.

[39] In the present case, were the respondents able to foresee that the various acts or omissions complained of (arising from the preparation of the original layout plan and the subsequent amendments of the same) would lead to an undue delay in the approval of the CFO causing the appellants to suffer consequential financial loss? It was the finding of the Court of Appeal that on the assumption that the various acts and omissions complained of against the respondents were true, the respondents ought to have foreseen that such loss would occur. However, the court did not offer any reason to support the existence of reasonable foresight of damage on the part of the defendants.

[40] We do not agree with the above finding of the Court of Appeal. We are of the view that the requirement of reasonable foreseeability has not been satisfied. As the architects for the project, the layout plan was prepared and submitted in accordance with the instructions received by the respondents from the developer. The respondents were mainly responsible for the design and safety of the industrial buildings and compliance of the relevant laws. In the circumstances it would not be reasonable to impose a duty on the respondents to go into a detailed inquiry of the developer's obligations; for these are matters which are exclusively within the developer's scope of duty.

This argument is further strengthened where section 2.01 of the SPAs provides that reasonable amendments to the building plan may from time to time be made by the developer or the respondents with the approval of the appropriate authorities. In this case, the issue of consent of the neighbouring landowners which triggered the delay, was well within the scope of the developer's duty.

[41] Thus applying the standards of the reasonable man, it is our view that the respondents could not have foreseen any liability for consequential financial loss to the appellants arising from their action in submitting the original layout plan and amending the same leading to the undue delay in completing the building and the issuance of the CFO. For this reason alone, the appellants' claim against the respondents for pure economic loss on the grounds of late delivery of vacant possession of their building units must fail.

[42] Referring to questions 1, 2 and 3 posed in this appeal:

(i) Whether the architects (respondents) in a construction project owe a duty of care to purchasers apart from his duty in contract or tort to the developer?

The answer is in the negative.

(ii) Whether the architects' liability in tort to purchasers should arise on the basis that they fall within the range of persons who are reasonably foreseeable as likely to be injured by his lack of skill or diligence?

The answer is in the negative.

In this connection, the appellants' claims do not fall within the scope of work of the respondents. The appellants also failed to establish proximity of relationship between the parties to give rise to a duty of care. In view of the terms of the contract (SPAs) between the appellants and the developer and the specific remedy provided therein, the appellants' claims must fail.

(iii) Whether the purchasers' only remedy in law is to sue the developer?

The answer is in the positive.

Proximity Of Relationship Between The Parties And Public Policy

[43] As rightly pointed out by the Court of Appeal, reasonable foreseeability does not of itself lead to a duty of care. The Privy Council in *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] 1 AC 175 held that whether or not a duty of care in negligence existed depended primarily upon foreseeability of damage, together with the existence of a close and direct relationship or proximity between the parties, and that occasionally, it would be necessary to go on to consider whether public policy requires that liability should not attach. In the same case, the Privy Council criticised the applicable law in determining duty of care in England at that time, namely

the two-stage test of proximity and policy considerations laid down by Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] AC 728. The reason was that *Anns* equated "proximity" with the reasonable foresight of damage thus giving rise to an indeterminate liability in negligence claims.

[44] To put it in a nutshell the preferred test is the three fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The three fold test has been recognised by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp. 617-618, His Lordship said that:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[45] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases. The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered. As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss. As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. The reason for a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues.

Claim For Pure Economic Loss

[46] In the present appeal, the Court of Appeal was also of the view that damages claimed by the appellants which were in the nature of pure economic loss were not recoverable since they were not linked to any personal injury or structural defects or damage to the property.

[47] The Court of Appeal observed that:

> [61] Moreover, in the present case, there is another pertinent legal consideration: we find that the damage suffered by the plaintiffs is purely financial in nature. The financial loss is not linked to any personal injury or structural defects or damage to property. None of the plaintiffs complain of any personal injury or of any structural defects or damage to

his industrial building as a result of the lateness in obtaining the CFOs or as a result of the manner that the defendants dealt with the CFO issue. We are, of course, mindful of the High Court judgment in *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors* [1997] 3 MLJ 546; but, nonetheless, we are of the view that the weight of judicial opinion are against extending the *Donoghue v. Stevenson* principle to pure economic loss (see *D & F Estates Ltd v. Church Commissioners for England* [1989] AC 177; *Murphy v. Brentwood District Council* [1991] 1 AC 398; *Kerajaan Malaysia lwn Cheah Foong Chiew dan lain-lain* [1993] 2 MLJ 493; *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd* [1995] 2 MLJ 663). In *Murphy v. Brentwood Lord Keith of Kinkle* said (at p 468):

> The right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent mis-statements, as in *Hedley Byrne*.

[48] Pure economic loss refers to financial loss suffered by a plaintiff, due to the negligence of the defendant which does not arise from any physical damage to his person or property (see the case of *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* [1999] 8 CLJ 403; [1998] 2 MLJ 53 and *UDA Holdings Bhd v. Koperasi Pasaraya (M) Bhd & Other Appeals* [2009] 1 CLJ 329; [2009] 1 MLJ 737).

[49] In the present appeal, the appellants whose buildings were not completed claimed for the loss of progress payments made and interests. The remaining appellants claimed for losses of use and the costs of alternative buildings, loss of rental profits and incomes. It is pertinent to note that such claims do not arise from any defect in the construction of the industrial units. The nature of their claims are dissimilar to the claim for pecuniary loss in the case of *D & F Estates Ltd And Others Appellants and Church Commissioners For England And Others Respondents* - [1989] AC 177 where an action was brought by the occupier of a property against the main contractor for the cost of remedial work and loss of prospective rent while the remedy work was done arising from defective workmanship of the property. The appellant's claims are also distinct from the facts in *Bryan v. Maloney* (1995) 128 ALR 163 where the High Court of Australia allowed a claim made by a subsequent purchaser of the property for financial loss involved in the decrease in the value of the property resulting from the developer's negligence in constructing the property with inadequate footing.

Claim For Pure Economic Loss In Malaysia

[50] In Malaysia, the legal position in respect of claims for pure economic loss in the law of negligence is a little unclear. At the apex court, claims for pure economic loss were largely decided on considerations of public policy. It was held by the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389 (the *Highland Towers*' case) that, there can be no recovery for pure economic loss against a local authority, on grounds of public policy.

[51] The law restricting claims for pure economic loss against public authorities in Malaysia has also been restated by the Federal Court in *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329; [2009] 1 MLJ 737. It was held there that the policy considerations laid down in the *Highland Towers*' case must necessarily refer and extend to all claims in tort, resulting in economic loss brought against local authorities.

[52] Should the same policy consideration be extended to a claim for pure economic loss against architects? This is the issue posed in question no. 4. Counsel for the appellants submitted that in Malaysia, although a claim for pure economic loss is not recoverable against a local authority on grounds of public policy (*Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389), the law does not extend to private bodies or professionals rendering services for commercial consideration.

[53] In the *Highland Towers*' case, the plaintiffs who were the residents of Block 2 and 3 of the Highland Towers' apartments brought a claim principally in negligence and nuisance against various parties for the injury suffered as a result of the collapse of Block 1. The local authority, Majlis Perbandaran Ampang Jaya (MPAJ) was the fourth defendant. The plaintiffs' claim against MPAJ was for contributory negligence for the loss in the value of their apartments in consequence of the collapse of Block 1.

[54] In the Federal Court, one of the questions where leave was granted to MPAJ to appeal to the Federal Court was: "whether pure economic loss is recoverable under our Malaysian jurisprudence with reference to a) negligence and b) nuisance". This issue was in relation to the plaintiffs' claim for breach of duty of care in respect of post collapse liability. The trial judge found negligence on the part of MPAJ in that after the collapse of Block 1, MPAJ failed to fulfil its obligation towards maintenance of a stream which flowed down a hill.

[55] However, the Court of Appeal set aside liability for the post collapse on grounds of jurisdiction in that the plaintiffs ought to enforce their rights by way of judicial review instead of filing the action in private law proceedings. At the Federal Court, the panel was divided on this issue. The majority (Abdul Hamid Mohamad FCJ and Arifin Zakaria FCJ concurring) ruled in favour of MPAJ while Steve Shim FCJ decided the question in favour of the plaintiffs. Abdul Hamid Mohamad FCJ in his judgment observed that:

> [86] While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of s. 3 of the Civil Law Act 1956 and, considering the 'public policy' and the 'local circumstances', whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case.

[56] It is noted that the judgment in the *Highland Tower*'s case was answered giving emphasis to considerations of public policy, in the context of s. 3 of the Civil Law Act. Nevertheless, it was clearly stated that damages in the nature of pure economic loss is recoverable in Malaysia "under limited situations". However the court was silent as regards the circumstances giving rise to such duty of care.

Claim For Pure Economic Loss In England

[57] At common law, the English courts have long held the view that claims in negligence should be treated differently from other tortious claims, depending on the type of damages suffered by the plaintiff. The rule is that a duty of care can exist only in cases of damages caused to the plaintiff in person or to his property and the recovery of economic loss was only permissible to the extent that it arose directly from the physical damage.

[58] The English courts would normally apply a restrictive approach in determining claims for pure economic loss to avoid "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp v. Touche* (1931) 255 NY 170).

[59] Pure economic loss can be recoverable only if it flows from breach of contractual duty. The notion is that claims for pure economic loss must always fall within the purview of contractual obligations of the parties due to its pecuniary nature. To decide otherwise would undermine the principles of contract law.

[60] Recovery of pure economic loss in tort was allowed in very limited situations. Following the House of Lords' decision in *Hedley Byrne v. Heller* [1964] AC 465, an exception was made to the law restricting claims for pure economic loss in negligence action. This exception is only applicable in the existence of "special relationship" or proximity between the parties giving rise to an assumption of liability. In the absence of a contract, a defendant can be made liable for negligence if it could be proved that there was active intervention on his part in the form of advice or conduct amounting to representation which had been relied upon by the plaintiff.

Development Of Law For Pure Economic Loss In England

[61] The English law of negligence has evolved over the years. These developments relate to the extent to which economic losses could be recovered independently of any contract.

(i) Categorisation approach

The principle of law in *Hedley Byrne* recognised a category of negligence action known as negligence misrepresentation wherein liability is based on the principle of assumption of liability.

A (ii) General principles to determine a duty of care

The general principle governing the existence of a duty care was propounded by Lord Wilberforce in the decision of the House of Lords in *Anns v. Merton London Borough Council* [1978] AC 728. The test was known as the two-stage test. Firstly it required a sufficient relationship
B of proximity based upon foreseeability and secondly, considerations of reasons why there should not be a duty of care. However, the general principles attracted considerable criticisms as it created indeterminate liability in negligence claims in particular to claim for pure economic loss.

C (iii) The incremental approach and the three fold test of foreseeability, proximity and policy considerations

The House of Lords in *Murphy v. Brentwood District Council* [1991] 1 AC 398 overruled the two-stage test in *Anns* and endorsed the incremental
D approach envisaged by the Australian High Court in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1. This incremental approach calls for the development of the law in incremental stages by using precedents as a yardstick against which all claims in negligence should be measured. For the law to develop incrementally, the court recognised the three fold
E test enunciated by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605, 617-618) that of foreseeability, proximity and policy considerations as the elements giving rise to a duty of care.

The House Of Lords Decision In Murphy v. Brentwood District Council [1991] 1 AC 398

F **[62]** The decision in *Murphy* governs the recent position in England determining a claim for pure economic loss in negligence. In *Murphy*, the plaintiff purchased a house from the local council. The house was built with a defective foundation. The plaintiff sold the house below market value and claimed damages against the council. It was argued on behalf of the plaintiff
G that the council had negligently relied on consulting engineers who had approved the design of the foundation as suitable. Applying the incremental approach, the House of Lords held that the property owner's loss namely the loss in the diminution in the value of the building was purely economic, therefore liability of the authority for damage of the kind suffered by the
H plaintiff can only be based on the principle of reliance. In the circumstances of the case, it was found that there was no special proximity in the relationship of a local authority as statutory supervisor of the building operations and a purchaser of a defective building capable of giving rise to such a duty.

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[63] In *Murphy*, Lord Oliver at pp. 485-486 of the judgment said that: A

> The critical question, as was pointed out in the analysis of Brennan J in his judgment in *Council of the Shire of Sutherland v. Heyman*, (1985) 157 C.L.R. 424, is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff B claims to have sustained: see *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605. The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is such - or, to use the favoured expression, whether it is of sufficient "proximity" - that it imposes upon the latter a duty to take care to avoid or prevent C that loss which has in fact been sustained. That the requisite degree of proximity may be established in circumstances in which the plaintiff's injury results from his reliance upon a statement or advice upon which he was entitled to rely and upon which it was contemplated that he would be likely to rely is clear from *Hedley Byrne* and subsequent cases, but *Anns* [1978] A.C. 728 was not such a case and neither is the instant case. It is D not, however, necessarily to be assumed that the reliance cases form the only possible category of cases in which a duty to take reasonable care to avoid or prevent pecuniary loss can arise. *Morrison Steamship Co. Ltd. v. Greystoke Castle* (Cargo Owners), for instance, clearly was not a reliance case. Nor indeed was *Ross v. Caunters* [1980] Ch. 297 so far as the E disappointed beneficiary was concerned. Another example may be *Ministry of Housing and Local Government v. Sharp* [1980] 2 Q.B. 223, although this may, on analysis, properly be categorised as a reliance case.

See also the approach of Lord Bridge in *Murphy* at p. 481 of the judgment where he said that:

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> There may, of course, be situations where, even in the absence of contract, there is a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace purely economic loss. The decision in *Junior Books Ltd v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 can, G I believe, only be understood on this basis.

[64] The above views countenanced that the English courts have taken the position that a claim for pure economic loss must not be recoverable in tort in the absence of a special relationship of proximity imposing on the defendant a duty of care to safeguard the plaintiff from pure economic loss. H By the incremental approach, this special relationship of proximity must fall within the category of cases in which the law recognises a duty on the part of a defendant to take reasonable care to avoid or prevent pecuniary loss. For this reason, the plaintiff's claim in *Murphy* was dismissed for his failed to prove the doctrine of reliance in order to establish the necessary relationship I of proximity as founded by the court in *Hedley Byrne*.

[65] By reason of the so called incremental approach, the three fold test of foreseeability, proximity and policy considerations as the elements giving rise to a duty of care has limited application. Lord Bridge in his judgment in *Caparo Industries Plc v. Dickman And Others* [1990] 1 All ER 568, reiterated that these three ingredients are not meant to be used as a practical test or touchstone for all cases of negligence. They are merely "convenient labels" or "descriptive phrases" and that they "are not susceptible of any such precise definition". At pp. 573-574 of the judgment, he said that:

> But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.

[66] In a recent decision, Lord Walker in *Customs and Excise Commissioners v. Barclays Bank plc* [2007] 1 AC 181), criticised the three fold test stated in *Caparo*, declaring it as "a set of fairly blunt tools". In *Customs and Excise Commissioners*, the issue before the House of Lords was whether a bank served with notice of a *Mareva* injunction order, owes a duty of care to the claimants who obtained the order against the defendants in civil proceedings. In answering the issue in the negative, the House of Lords adopted a multi-test, comprising assumptions of responsibility, the incremental approach and the three-fold test in *Caparo* and treated the different approaches as mutually supportive rather than exclusive in their applications.

Claim For Pure Economic Loss In Singapore

[67] The law of negligence in Singapore is governed by the decision of the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4 SLR 100. In its judgment, the Court of Appeal realigned the law of negligence in Singapore. The Court of Appeal propounded a universal test to be applied by the courts in determining the existence of a duty of care in all negligence cases, regardless of whether it is physical damage or pure economic loss that has been sustained by the plaintiff and irrespective of whether the loss arose from a negligent misstatement or negligent physical act/omission.

[68] The test to determine the imposition of a duty of care was a two-stage test comprising first, proximity and, second, policy considerations, which were together preceded by the threshold question of factual foreseeability. It was held that a *prima facie* duty of care arises by satisfying the preliminary

question of factual foreseeability and the first stage of the legal proximity test. Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. The two-stage test is to be applied incrementally with reference to the facts of decided cases.

The Position Before *Spandeck*

[69] Even before *Spandeck*, there was a departure by the Singaporean courts from the English position restricting recovery for pure economic loss. The law relating to recovery of pure economic loss was substantially contained in two landmark cases of *RSP Architects Planners and Engineers v. Ocean Front Ptd Ltd (Ocean Front) & Another Case* [1996] 1 SLR 113 and *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v. Management Corp Strata Title Plan No.1075 (Eastern Lagoon)* [1999] 2 SLR (R) 134. In both cases, the Singapore Court of Appeal used a "two-stage process" to consider, first whether there is a sufficient degree of proximity to give rise to a duty of care, and secondly, if such a degree of proximity was found, whether there is any material factor or policy which precludes such duty from arising, considering whether pure economic loss was recoverable in tort.

[70] In the *Ocean Front*'s case *(supra)*, the Court of Appeal allowed the management corporation (homeowners' association) action against the developer of a condominium project for recovery of costs incurred in remedying the defects arising out of faulty construction of common property. Similarly in the *Eastern Lagoon*'s case *(supra)*, the Court of Appeal allowed the claim made by the management corporation against the architects of a condominium for the costs of rectifying defectively designed walls. Thus both cases relate to flaws in the building structure.

The Facts In *Spandeck*

[71] *Spandeck* involved an action in negligence filed by a contractor in a project against the supervising officer for economic loss that it had suffered as a result of under-certification of its works by the latter. The plaintiff was awarded a contract by the Government of Singapore to redevelop a medical facility at an army camp. Pursuant to the contract, the defendant was appointed the superintending officer of the project and was responsible for certifying interim payments in respect of the plaintiff's work for the project. A dispute arose when a revised summary of tender and a cost break down submitted by the defendant did not reflect the actual value of the works to be carried out by the plaintiff. The plaintiff claimed that the defendant had breached his duty of care by negligently undervaluing and under-certifying the plaintiff's works.

[72] As a matter of fact, the plaintiff novated the contract to another contractor, suffering losses in the process. By reason of the novation of the contract, the plaintiff was precluded from pursuing its right under cl. 34 of the contract and to claim the under-certified amounts against the

A employer by way of arbitration proceeding. In view of the above, the plaintiff brought an action in tort against the defendant to pursue its losses. The issue before the court is whether the defendant could be held liable in negligence for the plaintiff's pure economic loss.

B **[73]** On appeal, the Court of Appeal dismissed the plaintiff's appeal and affirmed the finding of the High Court that there was no duty of care owed by the defendant. It was held that the plaintiff failed to satisfy the requirement of sufficient proximity in view of the existence of the arbitration clause in the contract.

C **[74] The Two-Stage Test In *Spandeck***

(a) "Sufficient legal proximity"

The first stage of proximity required "sufficient legal proximity" between the claimant and defendant for a duty of care to arise. The focus is on the closeness of the relationship between the parties, including
D physical, circumstantial and causal proximity, supported by the twin criteria of voluntary assumption of responsibility and reliance.

(b) Policy Considerations

If a positive answer to the threshold question of factual foreseeability
E and the first stage of proximity was assumed, a *prima facie* duty of care arises. Policy considerations, such as the presence of a contractual matrix which clearly defined the rights and liabilities of the parties and their relative bargaining positions then arise and they are applied to the factual matrix to determine whether or not to negate this *prima facie*
F duty.

(c) Incremental approach

The two-stage test is not exclusive since it must be advocated by the incremental approach. The two-stage test is to be applied incrementally with reference to the facts of decided cases. However, the absence of a
G factual precedent in analogous situations of proximity and/or policy considerations should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor.

H **[75]** It could be observed that the ingredients giving arise to the existence of a duty of care as expounded in *Spandeck* are not dissimilar to the law in England. Applying the incremental approach, both jurisdictions take a restrictive approach in the development of the law of negligence. Nevertheless, unlike the decisions in *Caparo* and *Murphy*, *Spandeck* took a step
I further by recognising these ingredients of foreseeability, proximity of relationship and policy consideration as general principles that will serve as a guide for all cases. Hence general principles are to be applied for a smooth evolution of the law of negligence, such that it is not unduly hampered by an over-reliance on precedents as happened in England.

[76] As a matter of interest, *Spandeck* imposes a "single test" or universal test in all negligence cases which makes all claims for damages arising from negligent conduct now becoming more restricted, regardless of whether the plaintiff sustained physical damage or pure economic loss, and irrespective of whether the loss arose from a negligent misstatement or negligent physical act/omission.

[77] The principles laid down in *Spandeck* have been applied by the Singapore Court of Appeal in *Tan Juay Pah v. Kimly Construction Pte Ltd and Others* [2012] SGCA 17, a construction building dispute. *Spandeck* is also being applied as a general principle in establishing duty of care in other negligent cases eg, *Go Dante Yap v. Bank Austria Creditanstalt AG* [2011] SGCA 39 on the liability of banks on the losses suffered by its client on the latter's investments.

The Malaysian Position

[78] In Malaysia, a call was made by the apex court of the country to not follow English law as propounded by *Murphy*.

(i) In the *Highland Towers*' case, Steve Shim FCJ (dissenting) who ruled in favour of the plaintiff on the issue of recoverability of pure economic loss, reviewed the House of Lords' decision in *Murphy v. Brentwood District Council* and concluded that a claim for pure economic loss is recoverable in negligence in English law on two alternate bases, namely the "categorisation approach" and "open-ended approach". By the former, the courts determine whether the facts and circumstances of the plaintiff's claim fall into a recognised category of liability such as assumption of liability. In the absence of a recognised category of liability, the courts shall resort to the "open-ended approach" by a close examination of the facts and circumstances of the case to determine whether a duty of care should nevertheless be owed by the defendant to the plaintiff. In Steve Shim FCJ's view, the two approaches may overlap.

His Lordship added that other Commonwealth jurisdictions namely Australia, Singapore and New Zealand have adopted the "open-ended approach" in which the recoverability of claims for pure economic loss in negligence cases is dependent on the facts of individual cases. Nevertheless, in his view, caution should be exercised in extending the principle in *Donoghue v. Stevenson* [1932] AC 562 to new situations with regard to claims for pure economic loss in negligence cases. His Lordship observed that:

> [20] Having had the benefit of reading the various authorities on this subject, I am more inclined to accept the positions taken by the courts in Australia and Singapore. In adopting the sentiments and observations expressed by the Singapore Court of Appeal in *PT Bumi International Tankers*, I would also endorse the view that

A caution should be exercised in extending the principle in *Donoghue v. Stevenson* to new situations. Much would depend on the facts and circumstances of each case in determining the existence or otherwise of a duty of care.

(ii) However, the majority decision (in the *Highland Towers*' case) reserved B their view as to the approach to be adopted by the courts in Malaysia in dealing with claims for pure economic loss in negligence cases. As stated earlier, the judgment of Abdul Hamid Mohamad FCJ was confined to issues of public policy on the liability of a local authority ie, the MPAJ in an action for negligence for pure economic loss. C His Lordship further observed that:

[77] I shall not enter into the discussion whether the 'categorisation approach' or the 'open-ended approach' should be accepted by the courts in this country. That has been sufficiently dealt with by the learned CJ (Sabah & Sarawak). After all, as correctly stated by learned CJ (Sabah & Sarawak), the two D approaches do not exist in strict water tight compartments. It is possible for them to overlap.

[78] Even if we accept that the question is not the nature of the damage itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such E as to embrace damage of the kind suffered by the plaintiffs, there is the additional factor to be considered, ie whether it is fair, just and reasonable to impose such a duty. This is where public policy and local circumstances come into consideration: In *Caparo Industries plc v. Dickman* [1990] 1 All ER 568 (HL) at pp 573-574, Lord Bridge said:

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> *What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in* G *which the council considers it fair, just and reasonable that the law should impose a duty of a given scope on the party for the benefit of the other*. (emphasis added)

(iii) The policy approach taken by the majority view probably could be explained by the common stand of the parties, in that action, on H recovery of pure economic loss which is permissible in the law of negligence and that the actual dispute was merely on the application of the law to the facts of the case. On that premise, Abdul Hamid FCJ said that:

[79] The question then is, considering the public policy and local I circumstances, is it fair, just and reasonable to impose a liability on MPAJ, a local authority, for pure economic loss to the plaintiffs for its failure (so far) to come up with and implement the promised

> drainage master plan or to stabilise the hill slop on Arab Malaysian Land to ensure that; no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3? ...
>
> With limited resources and manpower local councils would have to have their priorities. In my view the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area.

(iv) The Court of Appeal in *Lim Teck Kong v. Dr Abdul Hamid Abdul Rashid & Anor* [2006] 1 CLJ 391; [2006] 3 MLJ 213, also shared the same view with Steve Shim FCJ that is, for the Malaysian courts to depart from English law in respect of claims for pure economic loss in negligence cases. It was held by way of *obiter*, that in building construction disputes, a claim for pure economic loss be recovered in a claim for negligence and that it should be confined to injuries suffered due to defective buildings and structures. His Lordship said that:

> [35] In our view, the learned judge was within his right to award damages on pure economic loss. We have been too long in the shadow of the House of Lords' decisions of *Murphy* and *D & F Estates*. We are of the view that it is time for us to move out of that shadow and move along with other Commonwealth countries where damages could be awarded on pure economic loss. In the media, we have seen how consumers suffer due to shoddy and haphazard manner the developers and contractors in putting up buildings with so many defects and in most cases, delay. The Legislature and the Government are fully aware of this and for those reasons a special tribunal has been set up to cater for complaints in respect of houses. As such, the courts should also play their part in this.

[79] However, the above decision was merely *obiter* since it was the finding of the court that the claim in that case could not be categorised as pure economic loss.

[80] As a matter of interest it can be seen that as regards the proper approach that should be used in imposing a duty of care, legal thinking has been divided between the use of general principles as a test for duty, and the incremental approach which calls for the development of the law in incremental stages by using precedents as the yardstick against which all claims in negligence should be measured.

[81] In the present appeal, the Court of Appeal dismissed the appellants' claim after applying elements of policy considerations to the facts of the case. It was held that:

> [60] In the present case, it is our judgment that, considering the facts of our case and the judicial authorities (none of which is on all fours with the facts of the present case), it would not be just and reasonable to impose a duty of care on the defendants/architects to ensure that there is no undue delay on the part of the developer (Merger Acceptance) in

obtaining the CFOs from the local authority, MPSP. The plaintiffs, as purchasers, had entered into a contractual relationship with the developer, Merger Acceptance, and the latter is contractually obliged under cl 7.03 of the SPA to ensure that the CFO is obtained without undue delay. Therefore, should there be any undue delay in obtaining the CFO, due to some carelessness or blunder or omission on the part of the developer or its agents (the defendants, being the developer's architects, are the agents of the developer), the plaintiffs'/purchasers' only remedy, in our view, is to sue the developer for breach of contract or for negligence, and not to sue the defendants/architects, who have no contractual relationship with the plaintiffs/purchasers, by attempting to invoke the law of negligence. If the defendants/architects were careless or negligent in carrying out their duties resulting in a delay in the issuance of the CFO, it is to the developer that they should be answerable; and not to the plaintiffs/purchasers. The defendants/architects were not appointed by the plaintiffs/purchasers; nor were they agents of the plaintiffs/purchasers. The defendants/architects were appointed by the developer, and they were the agents of the developer. They certainly owe a duty of care to the developer, their employer, to ensure that there would be no undue delay in obtaining the CFOs. In our judgment, in the light of the contractual arrangements of the parties, it would not be fair to impose on the defendants a duty of care to the purchasers with regard to the obtaining of the CFOs. In our view, on the facts of the present case and, in particular, the contractual arrangements of the parties, it would be apt to adopt the following statement in the judgment of the Singapore Court of Appeal in *Man B&W Diesel* (at p 321):

> It is not for the court to help a party, after the event, to improve his commercial bargain.

[82] In other words, the imposition of policy considerations require some measure of public policy to be infused in the establishment of a duty of care. In the present appeal, we agree with the Court of Appeal that the court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly define the rights and liabilities of parties and their relative bargaining positions. There can be no action against the architects if the remedy asked for is specifically provided for in the contract. Otherwise, it has the effect of rewriting the contractual terms. Such claims must be dismissed on grounds of policy. Nevertheless, we must reiterate that a claim for negligence must be brought within the scope of duty of care. The recoverability of claims for pure economic loss in negligence cases is dependent on the facts of individual cases. Some measure of public policy must be considered though it should not be the sole determinant of liability.

[83] We are also in agreement with the submissions of counsel for the respondents that it would also be against public policy to impose on architects a duty to deliver vacant possession of buildings within the developer's contractual period. In our view, this would only serve to compromise or even impede their professional duty in ensuring that the building laws are observed and that the structure of the building is safe.

[84] Thus we come to question no. 4:

Whether the Federal Court as the apex court should not be the final determiner of judicial policy on extensions of liability of architects to cover pure economic loss?

The answer is in the negative.

In view of the answers given to questions nos. 1- 4 we need not answer question no. 5.

Conclusion

[85] It would not be fair, just and reasonable to impose on architects a duty of care for a responsibility which they had not assumed or one which is not within their professional scope of duty. We are of the view that in this case, the requirements of reasonable foreseeability has not been satisfied. As the architects for the project, the layout plan was prepared and submitted in accordance with the instructions received by the respondents from the developer. The respondents were mainly responsible for the design and safety of the industrial buildings and compliance of the relevant laws. The appellants' claims do not fall within the scope of work of the respondents. Thus applying the standards of the reasonable man, the respondents could not have foreseen any liability for consequential financial loss to the appellants when there was delay in the completion of the building and the issuance of the CFO. For this reason alone, the appellants' claim against the respondents for pure economic loss on grounds of late delivery of vacant possession of their building units must fail.

[86] Claims for pure economic loss in negligence cases must always be brought within the scope of duty of care. The court should exercise caution when determining the existence of a duty of care and allowing claims for pure economic loss. In determining the existence of a duty of care in such cases, much would depend on the facts and circumstances of each case.

[87] In the circumstances, we dismiss this appeal with costs.

P.S In view of the position taken in *Spandeck*, it becomes questionable how the so called threshold question of "factual perspective" is to be satisfied in a negligence claim in the absence of any legal principle including that of the reasonable man test. Hence even if one were to look at the concept of reasonable foreseeability from a factual perspective, it should not by its very nature be out of place in a legal test. That being the case, it might have been preferable if the test in *Spandeck* had simply been formulated as a three-stage test of foreseeability, proximity and policy considerations.